82-47

Office-Supreme Court, U.S.
FILED
JUL 9 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES E. GAMBREL,

Petitioner,

v.

KENTUCKY BOARD OF DENTISTRY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS

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QUESTIONS PRESENTED

WHETHER PETITIONER JAMES E. GAMBREL WAS DENIED DUE PROCESS BY THE TRIAL COURT'S FAILURE TO CONDUCT AN ORDERLY AND FAIR PROCEEDING AS GUARANTEED BY THE CONSTITUTIONS OF THE UNITED STATES AND COMMONWEALTH OF KENTUCKY?

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NO.

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JAMES E. GAMBREL,[1/]

Petitioner,

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KENTUCKY BOARD OF DENTISTRY,

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PETITION FOR A WRIT OF CERTIORARI
TO THE COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

1/ James E. Renfro, Sr., an appellant in the Commonwealth of Kentucky Court of Appeals, is not a respondent because the Circuit Court's order finding him in contempt was reversed and remanded with instructions to vacate.

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DECISIONS BELOW

The Kentucky Supreme Court denied the petitioner's motion for discretionary review on April 13, 1982. The decision is unreported. A copy of the order is found in the Appendix, page A-1[2/] The opinion of the Court of Appeals of the Commonwealth of Kentucky, sustaining the issuance of an injunction under KRS Chapter 313 against petitioner, was rendered on December 18, 1981 at 10:00 a.m. This opinion is unreported. A copy of the opinion is found in the Appendix, Page A-2. The Kentucky Court of Appeals also denied petitioner's motion for rehearing on

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2/ A refers to the appendix of this petition.

February 26, 1982. A copy of this order is found in the Appendix at A-12. The injunction and finding of facts and conclusions of law by the Honorable Charles H. Anderson of the Jefferson Circuit Court Third Division on December 30, 1980 at 4:15 p.m. is found at Appendix, page A-13.

JURISDICTIONAL STATEMENT

The petitioner invokes this Court's jurisdiction under 28 U.S.C., Section 1257(3). The order of the Supreme Court of Kentucky was entered on April 13, 1982 at 10:00 a.m. This petition will be timely if filed by mail on or before July 12, 1982 without extension.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION
FOURTEENTH AMENDMENT

Which states in pertinent part:

..."nor shall any State deprive any person of life liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public Trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

KENTUCKY CONSTITUTION
SECTION 11 BILL OF RIGHTS

In all criminal prosecutions the accused has the right to be heard by himself and Counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the Judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the Defendant and the Commonwealth, the change to be made to the most convenient county in which a fair Trial can be obtained.

STATEMENT OF THE CASE

On December 5, 1976 the respondent filed a complaint against James E. Gambrel, a licensed dental laboratory technician, alleging that he violated the Kentucky Dental Practice Act. In support of its complaint, the Kentucky Board of Dentistry attached an affidavit of Donald L. White, an office associate of the respondent's attorney, alleging that James E. Gambrel had engaged in certain acts constituting the illegal practice of dentistry, thereby violating KRS Chapter 313. The complaint sought a permanent injunction against James E. Gambrel pursuant to the act. James E. Gambrel denied all allegations in the complaint.

Hon. Judge Liebson, Ninth Division, dismissed the action without prejudice because the Kentucky Dental Board had not authorized the action as required by the Dental Practice Act.

At approximately the same time Donald White also obtained a warrant charging Gambrel with a violation of the criminal section of the same Dental Practice Act.

A new cause of action, Case No. 237585 was then filed and assigned to Division Three of the Jefferson Circuit Court. Defendant moved, pursuant to Jefferson County Rule 905, a mandatory transfer rule, to have this case transferred to Division Nine, but was overruled.

The case was heard before the Third Division of the Jefferson Circuit Court, Hon. Charles H. Anderson, together with the case of the Kentucky Board of Dentistry v. James E. Renfro, Sr., No. 55789, a totally unrelated contempt case. The Renfro case was reversed by the Court of Appeals, See Footnote 1. This consolidation of trials was over the objection of James E. Gambrel and James E. Renfro, Sr.

In December 1977 a grand jury indicted Gambrel after a November grand jury refused to issue an indictment. Lowell Thompsen, the respondent's attorney and assistant Commonwealth attorney had the case resubmitted to the December grand jury.

The Trial Court set the commencement of the trial for Friday, May 12, 1978, starting at 3:30 p.m. (Tr. Vol. 1, p. 128) Defense counsel objected (Tr. 127 and 30-31), based on the failure of the Trial Court to follow Civil Rule 40 and Jefferson County Rule 103, as that was the day in whch the Kentucky Bar Association has its convention, and is not to be a Court date. Further, defense counsel objected on the day of trial reporting that he was too ill to proceed. The Court overruled his objection.

An assistant Commonwealth attorney, Lowell Thompson, who was also representing the Kentucky Dental Board, an official agency of the Commonwealth of Kentucky, as a contract attorney,

pursuant to KRS 12.210 was at the trial. Although the Kentucky Dental Association, a private trade association, was not a party to this suit, their counsel, John T. Fowler and John T. Fowler, III, participated in the prosecution of the petitioner over objection. The Fowlers were allowed to participate in the trial in the unusual capacity as attorneys for the members of the Board individually, although the individual members were not parties to either of the actions. (Tr. 6-2-78, p. 48)

The Board of Dentistry called their witnesses on the evening of May 12, 1978. As the trial progressed, petitioner counsel became progressively ill (Tr. 5/12/78, p. 81). He repeatedly

requested the Court to adjourn. Petitioner's counsel was physically unable to cross-examine the respondent's witnesses (Tr. 5/12/78, pp. 88-92). Subsequently, petitioner's counsel was rushed to a hospital emergency room, where he was treated for what was diagnosed as intestinal flu.

The trial continued even though the petitioner was unrepresented by counsel. (Record Vol. II, p. 139) The petitioner was not afforded the opportunity to cross-examine the Board's witnesses. Further, before adjourning for the evening, the trial judge discussed the case with the counsel for respondent and the Kentucky Dental Association. The petitioner Gambrel, who was unrepresented at this time, was excluded from

this discussion. The respondent, having presented all its witnesses, rested its case and the case was continued to June 2, 1978.

On June 2, 1978, the Court first announced the respondent had completed its case (Tr. 6-7-78 p. 10) and the Court entertained directed verdict motions and mistrial motions. Then Hon. Judge Anderson reversed his position over objections and allowed the respondent to continue is case with more testimony (Tr. 5/12/78, p. 21).

Also on June 2, 1978, the Board was allowed to recall its main witness, Donald White, to the stand over objections. At the close of the Board's case on June 2, 1978, the defendants moved again for a directed verdict of acquit-

tal and a mistrial. The defense continued on June 23, 1978, and the trial ended on July 18, 1978. On August 4th, 1978, the trial court held a hearing on petitioner's motion to hold Donald White in contempt for filing a false affidavit in support of the petition for injunction. After the hearing the court refused to hold him in contempt.

On July 24, 1979, the petitioner, Gambrel, was tried criminally, before another division of the same Jefferson Circuit Court on the same facts, under the criminal section of the Dental Practice Act, and the same testimony of Donald White was given. At the end of the Commonwealth's case, the judge gave a directed verdict of acquittal, saying

that the Commonwealth had not met its burden of proof. Two and one-half years later, on December 30, 1980, the trial court rendered its decision and issued an injunction against petitioner James E. Gambrel, although KRS 454.350 requires orders be issued within 90 days.

ARGUMENT

THE PETITIONER JAMES E. GAMBREL WAS DENIED DUE PROCESS AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES AND THE COMMONWEALTH OF KENTUCKY BY THE TRIAL COURT'S FAILURE TO CONDUCT A FAIR, IMPARTIAL, ORDERLY NON BIASED PROCEEDING AND TO DECIDE THE CASE BASED ON THE STANDARD OF CLEAR AND CONVINCING EVIDENCE.

Justice can only exist where the legal system provides a formal structure in which adversaries can logically present evidence from which they may argue their respective positions. The greatness of the American System of Justice is that the trier of fact, judge or jury, is placed into a structure which removes all of the irrelevancies. The presumption that the judge as trier of fact is capable of extracting relevant information from irrelevant

matters, is overcome when the trial has become bedlam. The refusal of the trial court to follow court rules and laws of this free democratic society deprived the petitioner of due process, a fair trial on his day in court.

The issue of a fair trial with relevant evidence presented in an orderly fashion is an issue separate from that of the bias of the trial court. The due process clause of the Fourteenth Amendment to the United States Constitution requires that a defendant be tried before an unbiased judge. Johnson v. Mississippi, 403 U.S. 212, 216, 29 L.Ed.2d 423, 91 S.Ct. 1778 (1971). This constitutional guarantee presumes that the judge will conduct an orderly procedure with a prompt and

continuing presentation of evidence relevant to the issues raised by the pleading and decide the case by applying the appropriate standard for proof.

> "Perhaps no precise definition can be given it [a fair trial], but it certainly must be one where the accused's legal rights are safeguarded and respected. There must not only be a fair and impartial jury and a learned and upright Judge to instruct the jury and pass upon the legal questions, but there ought to be an atmosphere of calm, in which the witnesses can deliver their testimony without fear and intimidation, and in which the attorneys can assert the defendant's rights freely and fully, and in which the truth may be received and given credence without fear of violence."

Raney v. Commonwealth, 153 S.W.2d 935, 937 (Ky. App. 1941).

To understand the overwhelming bedlam and bias that denied the petitioner his right to due process and a

fair trial, it is necessary to read the entire transcript of a trial that on May 12, 1978 was declared an emergency, which continued until midnight and which would ultimately take two and one-half years to decide. While each incident alone as listed below would probably not in and of itself demonstrate that the trial was unfair, these incidents, taken as a whole and viewed in light of the entire proceedings, demonstrate petitioner's deprivation of due process and a fair trial. The incidents cited will generally be chronological.

1. VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS BY JOINING AN UNRELATED CONTEMPT CASE WITH THE PETITIONER'S CASE FOR TRIAL.

At the beginning of the trial petitioner moved to sever the action

against James E. Renfro from the action against himself. Kentucky Civil Practice Rule 20.01 regarding parties, states:

> "All persons may be joined in one action as Defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, if any question of law or fact common to all Defendants will arise in the action." (Emphasis added)

The Rules, including local Rule 904, clearly require common questions of law and facts for joinder of parties to be proper. Although misjoinder is not a basis for dismissal; it is a basis for severance of actions. Bradford v. Sargaves, 556 S.W.2d 166, 168 (Ky.App. 1978); Adam's Real Estate Corp. v. Ward, 458 S.W.2d 622 (Ky. 1978). The failure

of the trial court to grant the motion to sever the actions against petitioner from that of James E. Renfro, Sr. requires reversal because it was a clear abuse of discretion. Compton v. Commonwealth, 602 S.W.2d 150 (Ky. 1980). In this case, there were no common questions of law nor fact. See Sabastian v. Commonwealth, 623 S.W.2d 880 (Ky. 1981). These actions were initially brought separately and should have been tried separately.

The vast factual difference between the cases and differences in the types of actions clearly required separate trials. The action against James E. Gambrel was an injunction suit, while the action against James E. Renfro, Sr., was a contempt action. The plaintiff's

burden of proof in the case against James E. Renfro, Sr., was proof beyond a reasonable doubt. The plaintiff's burden of proof in the case against James E. Gambrel was based on clear and convincing evidence. The allegations in each suit were unrelated as to time and place and different sections of the Kentucky Dental Practice Act were allegedly violated. Further, there were different witnesses in each action. The trial was incomprehensible with the court constantly switching from one case to the next. The petitioner contends that the Kentucky Court of Appeals committed error in not reversing on this ground and in not allowing the defendant his day in court.

It is arguable that the merger of these two cases in effect should have given petitioner greater protection because of the added safeguards of the Sixth Amendment due to the quasi-criminal nature of the contempt action being tried with petitioner's action. However, the trial court also failed to recognize the alleged contemnor's constitutional rights.[3/]

2. DENIAL OF PETITIONER'S DUE PROCESS RIGHT TO COUNSEL.

Trial assignment of this case was made when petitioner's counsel was out of town. Petitioner's counsel had requested respondent's counsel prior to leaving not to put anything on the

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3/ James E. Renfro, Sr., the alleged contemnor, is not a party to this petition.

motion hour that week. (Record, pp. 127-128) In so doing the court violated CR 40, See Combs v. Griffith, 429 S.W.2d 849 Ky. 1968) and Harlan Coal and Cable v Kinser, 262 S.W. 937 (Ky. 1924).

In this case petitioner's counsel became ill during the initial trial proceeding which was declared an emergency. Petitioner's counsel was unable to cross-examine the Commonwealth's witnesses while he was present. (Tr. 5/12/78, pp. 81-86, 88). Subsequently, he went to the hospital. The court's remarks to petitioner's counsel after he collapsed and was leaving for the hospital suggest a belief that he was faking. This belief was disproved by the deposition of the doctor attending counsel at the

emergency room of Jewish Hospital (See Dr. Friedman's deposition). Once counsel became unable to proceed and especially after he departed for the hospital after collapsing, it became incumbent upon the judge to protect the constitutional rights of the unrepresented accused. Certainly the examination of witnesses is a critical portion of the trial. Even if one were to assume, contrary to the facts, that counsel for petitioner was at fault in departing from the court room, this does not excuse the judge from ignoring the paramount rights of the Defendants to counsel. The trial court failed to understand that the right to counsel is a right of the "accused" and not of the "attorney." The petitioner was unrep-

resented while the trial continued. The judge refused to delay the case, even overnight. Further, he did not ask the petitioner or the party who's case had been joined if they would like to act on their own behalf or have a court appointed attorney act in the absence of their attorney. See RE: Petition of Green, 369 U.S. 689, 8 L.Ed.2d 198, 82 S.Ct. 1114 (1962).

Further the trial judge held ex-parte discussions with the respondent's counsel and the additional counsel for the Kentucky Dental Association. The petitioner was excluded from the discussion and was thereby prejudiced.

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public Trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense. (Emphasis Added)

Similarly, §11 of the Bill of Rights in the Kentucky Constitution states:

> In all criminal prosecutions the accused has the right to be heard by himself and Counsel; to demand the nature and cause of the accusation against him; to meet the witnesses fact to face, and to have compulsory process for obtaining witnesses in his favor. He cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or porperty, unless by the Judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a

speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the Defendant and the Commonwealth, the change to be made to the most convenient county in which a fair Trial can be obtained.

One of the elements of a fair Trial is the right to be represented by Counsel. The United States Supreme Court has held that:

> "That failure to afford the Petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense a right to his day in Court are basic in our system of juris-prudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by Counsel." (Emphasis Added) Re: Oliver, 33 U.S. 267, 273, 92 L.Ed. 682, 694 (1947). See also Argersinger v. Hamlin, 407 U.S. 25, 326 L.Ed.2d 539, 92 §2006 (1972). (Emphasis Added)

The State of Kentucky also considers the right to be represented by counsel, basic to a fair trial. Woods v. Commonwealth, Ky. 305 S.W.2d 935 (1957). McIntosh v. Commonwealth, Ky. 368 S.W.2d 331 (1963); Cane v. Commonwealth, Ky.App. 556 S.W.2d 902 (1977); and May v. Hatterick, Ky. 261 S.W. 1091 (1924) and Ray v. Arnett, Ky. 106 S.W. 828 (1908). This includes the right to have effective assistance at all critical stages of the proceedings against the Defendant, United States v. Smith, 411 F.2d 733 (1969). In Smith, the Sixth Circuit Court of Appeals held that absence of counsel due to illness at the time the verdict was rendered violated the Defendant's Sixth Amendment rights. The additional protections of

the Sixth Amendment and Section 11 of the Kentucky Constitution Bill of Rights were applicable in this case because of the contempt action that was joined with petitioner's. However, the trial court failed to afford these protections to that party and in effect denied petitioner the due process of law that the was entitled.

3. THE TRIAL COURT DEPRIVED THE PETITIONER OF HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL FACT FINDER.

Petitioner's motion for mistrial based on denial of counsel was denied on June 2, 1982. This was the date the trial was continued to by the trial judge. The trial court attempted to cure the deprivation of due process and counsel by allowing Donald White to

retestify. White's testimony was the only relevant evidence presented by respondent to support the allegations in its complaint, against petitioner, although numerous subpoenaed witnesses, who had no knowledge of the facts in the complaint were paraded before the judge and intimidated by him.

The attempt by the trial court to cure the petitioner's deprivation of counsel at a critical portion of the proceeding must fail because once the deprivation has occurred, the damage has been done and there is nothing that can cure the deprivation. Allowing White to retestify gave the respondent a second opportunity to attempt to prove its case and hurt the petitioner more than helped because the deprivation had occurred and

couldn't be cured unless a new trial were to take place.

The other items which reflect the bias of the trial judge include:

1. The trial judge allowed the participation of counsel for the Kentucky Dental Society, a private trade group who never filed an appearance of Record in this case, over Defendants' objection. (Tr. 5/12/78, pp. 28, 53; 6/2/78, p. 48). See Wood v. Georgia, 450 U.S. 261, 67 L.Ed.2d 220, 101 S.Ct. 1097 (1981) and Gibson v Berryhill, 411 U.S. 564, 56 L.Ed.2d 488, 93 S.Ct. 1689 (1973).

2. The trial court judge allowed, over Defendants' objections testimony of several witnesses who had been subpoenaed to testify merely because they were seen in or near the Defendants' place of business, and who knew nothing of the Defendants or the allegation of the Plaintiff's Complaint. This evidence was totally irrelevant and immaterial. (Tr. 6/2/78, pp. 81-90)

3. The trial court judge then intimidated those witnesses

into testifying although they had been subpoenaed through an abuse of the subpoena process. (Tr. 6/2/79, pp. 81-90), CR 45.

4. After it became evident the Plaintiff had failed to prove his case, the trial judge continued the matter until a date three weeks after the initial hearing, although he originally proceeded late into the evening of May 12, 1978 over Defendants' counsel's objection because of the alleged emergency nature of the case. (Tr. 5/12/78, pp. 62, 113)

5. The order entered continuing the trial from May 12, 1978 to June 2, 1978, reflects the judge's bias because it states, "Both parties having appeared in person with Counsel..." when in fact, the Defendants were unrepresented during a portion of the trial.

6. Further the order states, "Part of the proof being heard." Yet, on June 2, 1978, Plaintiff's counsel stated that their proof as to James E. Gambrel was completed. (Tr. 6/2/78, p. 10). The judge unilaterally decided

to reopen James E. Gambrel's case (Tr., p. 17) and allow the Plaintiffs to attempt to cure the defect of May 12, 1978, wherein, Defendants were unable to cross-examine Donald L. White. Before deciding to reopen the case, the judge attempted to force the Defendant to agree that the defect would be cured by having the witness testify again. (Tr. 6/2/78, p. 22)

7. The trial judge denied Defendants' motion for a mistrial based on the conduct of the trial on May 12, 1978. (Tr. 6/2/78, p. 18)

8. The trial court judge denied the admission of Dr. Friedman's evidentiary deposition into evidence, as irrelevant and immaterial. The purpose of introducing this deposition was to satisfy the court that contrary to the trial judge's remarks, Defendants' counsel was not faking an illness. (Tr. 6/2/78, Vol. 1, pp. 16, 18-21).

9. The trial judge denied James E. Gambrel's motion for a directed verdict after the testimony of Donald L. White

was received for a second time and for a second time, the Plaintiffs failed to sustain their burden of proof. (Tr. 6/2/78, Vol. 2, p. 4)

10. The trial judge then attempted to separate the consolidated cases and go forward with the defense of James E. Gambrel.

11. After learning that the Plaintiff's counsel had failed to subpoena the Defendants, the judge was willing to allow a continuance to the Plaintiffs although on May 12, 1978, he would not do so for Defendants. (Tr. 6/2/78, Vol. 2, p. 12)

12. Although the trial judge allowed one woman to leave after she stated she did not want to testify, he did not allow a man to leave who didn't want to testify. (Tr. 6/2/78, Vol. 2, pp. 87-90)

13. The trial judge insulted Defendants' attorney. (Tr. 6/2/78, Vol. 2, pp. 87-90)

14. After it became evident that these witnesses had been improperly subpoenaed and had no knowledge of the Defendants, the trial judge

Rule 12 because he wanted to hear what the Defendants had to say. (Tr. 6/2/78, Vol. 2, p. 160)

20. The trial judge overruled the Defendants' motion for mistrial and motion that the case be heard by a special judge. (Tr. 6/2/78, pp. 169-173)

21. The trial judge's reflection on the atmosphere of the court room filled with sympathizers of Defendants reflects his bias. (Tr. 6/2/78, Vol. 2, p. 181)

22. The trial judge waited two and one-half years before deciding a case which had stood submitted all that time in violation of KRS 454.350.

4. STANDARD OF PROOF.

The trial court violated the petitioner's constitutional rights, by issuing an injunction against him without applying the standard of proof of clear and convincing evidence. The

still refused to exclude the witnesses. (Tr. 6/2/78, Vol. 2, pp. 114, 121, 134)

15. The trial judge thereafter told Defendants' counsels to submit written motions on their objections when previously he acknowledged that written motions were unnecessary. (Tr. 6/2/78, Vol. 2, pp. 5, 125, 134)

16. The trial judge improperly threatened an unsubpoenaed party, who the Plaintiff attempted to call to testify, with contempt and a jail sentence. (Tr. 6/2/78, Vol. 2, pp. 131-135)

17. The trial judge denied Defendants' motion for directed verdict. (Tr. 6/2/78, Vol. 2, p. 152)

18. The trial judge refused Defendants' attorney an opportunity to reply to Plaintiff's response to Defendants' motion. (Tr. 6/2/78, Vol. 2, pp. 153-154)

19. The trial judge overlooked the fact that the Plaintiff's proof must conform to his pleading, and overruled Defendants' motion under

appellate court erred by not reversing on this ground.

In this case, the petitioner Gambrel was tried criminally on the exact same charges, under the same Dental Practice Act and with the same testimony of Donald White (on May 24th, 1978) and received a directed verdict of acquittal. To be placed under an injunction, after this, is a deprivation of the petitioner's 14th Amendment right to due process, especially when the courts refuse to state the standard used for the injunction.

In Santosky v. Kramer, 71 L.Ed.2d 599 (1982) involving the clear and convincing standard, the court said,

> p. 608 The "minimum requirements (of procedural due process) being a matter of federal law, they are not diminished by the fact that the

> State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."

The Kentucky Board of Dentistry applied for injunction pursuant to KRS 313.360. This statute relates back to KRS 313.020 and KRS 313.010. The Kentucky Board of Dentistry, the party seeking the injunction, had the burden of proving to the trial court that James E. Gambrel practiced dentistry by engaging in one or more of the acts specified in KRS 313.020 by clear and convincing evidence.

It is clear that this statute, KRS 313.010(2), breaks down into the following elements:

> "Any person shall be regarded as "practicing dentistry":

(1) who, for a fee, salary or other reward paid, or to be paid either to himself, or to another person, performs or advertises to perform, dental operations of any kind,

(2) or who diagnoses or treats diseases or lesions of human teeth or jaws, or attempts to correct malpostions thereof, or who diagnoses or treats disorders, or deficiencies of the oral cavity and adjacent associated structures,

(3) or who takes impressions of the human teeth or jaws to be used directly in the farication of any intraoral appliance, or shall construct, supply, reproduce or repair any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except upon the written laboratory procedure work order of a licensed dentist and constructed upon or by the use of casts or models made from an impression taken by a licensed dentist,

(4) or who shall advertise, offers, sell or deliver any such substitute or the services rendered in the construction, reproduction, supply or repair thereof to any person other than a licensed dentist,

(5) or who places or adjusts such substitute in the oral cavity of another,

(6) or who uses the words "dentist," "dental surgeon," the letters "D.D.S.," "D.M.D.," or other letters or title in connection with his name, which in any way represents him as being engaged in the practice of dentistry."

The Board apparently was proceeding on element (1), since the other sections of the statute do not seem to fit the facts. Thus, the essential element to the Board's prima facie case was to show that an agreement between Gambrel and White had been reached. The uncontradicted testimony of Donald White demonstrated that no agreements as to price or fee to be paid was ever reached between Mr. Gambrel and Mr. White, and Mr. Gambrel never quoted a fee to Mr. White. Further, no denture or

appliance was ever made by Gambrel or received by White. Yet, the trial court found that James Gambrel quoted Donald White a fee of $175.00. James E. Gambrel argued in his brief to the trial court and appellate court that there was insufficient evidence to support the finding of the trial court. The Kentucky Court of Appeals in its decision responded to that argument by simply stating:

> "We limit ourself to the legal conclusion that such was sufficient to sustain the issuance of any injunction against Mr. Gambrel."

The evidence presented at the trial, which went uncontradicted was that Donald White and James Gambrel never agreed upon a price for a denture, and James E. Gambrel never quoted any

figure or price for any denture. The Court's summary affirmation of the trial court's finding is ambiguous, because it is not clear whether the court is establishing a new prima facie case for the Board by the elimination of proof of an essential element, or if the court is suggesting that the uncontradicted testimony of Donald White satisfied all elements of the Kentucdy Board of Dentistry case.

The testimony of Donald White, clearly establishes that Donald White and James Gambrel never agreed as to a fee to be paid for the denture. Further, no denture was made. The Board clearly did not satisfy all the elements necessary to establish a prima facie case, yet prove its case by clear and convincing evidence.

In Santosky v. Kramer, supra, the court stated:

> p. 609 "But this Court never has approved case-by-case determination of the proper standard of proof for a given proceeding. Standards of proof, like other "procedural due process rules(,) are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." Mathews v. Eldrige, 424 U.S. at 344, 47 L.Ed.2d 18, 96 S.Ct. 893 (emphasis added). Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessary must be calibrated in advance. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard."

Clearly, the Commonwealth was required to meet a burden of proof in the criminal case against Gambrel and failed to meet it. Likewise the

Commonwealth should be required to meet a burden of proof in a civil injunction case, a burden of clear and convincing evidence. The injunction was issued 2-1/2 years after the dismissal of the criminal charge on the exact same evidence. Although the civil standard is less than that required for a criminal case, the Commonwealth failed to meet either.

The petitioner has been harmed by having an injunction placed against him, in violation of the constitutional standards of proof under the 14th Amendment.

CONCLUSION

For the totality of the reasons set forth above, the petitioner requests that this Court issue a writ of certiorari to the Kentucky Court of Appeals.

Respectfully submitted,

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